BANK KERJASAMA RAKYAT MALAYSIA BHD

v.

TETUAN HARANAY, RONI & ANIKAH & ORS

HIGH COURT MALAYA, IPOH
CLEMENT SKINNER JC
[ORIGINATING SUMMONS NO: 24-704-98]
16 DECEMBER 1998

LEGAL PROFESSION: *Liability as officer of court - Breach of undertaking - Undertaking to meet client's obligation under a judgment - Whether undertaking unconditional - Whether enforceable - Court's summary jurisdiction to enforce a solicitor's undertaking - Principles*

The plaintiff had obtained judgment against one Ahmad Padli and had proceeded to auction off Ahmad Padli's goods. The intended auction, however, was aborted when the first defendant, the solicitors of Ahmad Padli, made a request to that effect and gave the plaintiff an undertaking that "We hereby give you our express and unqualified undertaking to pay you the sum of RM26,000 within six months from the date of this letter hereof in satisfaction of the judgment debt owing by our client". The first defendant did not honour the undertaking, and the plaintiff, in the circumstances, filed the present suit against the first defendant legal firm and its partners to enforce the undertaking. By an affidavit filed by Abdul Roni, the third defendant, the defendants sought to argue that the undertaking was conditional in nature and not enforceable, as the plaintiff's credit officer had verbally agreed not to enforce it until after Ahmad Padli had received his commission in respect of a certain land sale transaction amounting to RM26,706.25.

Held:

[1] The undertaking is expressed in clear terms, and no mention was made therein of any conversation between the credit officer and Abdul Roni nor to any commission payable to Ahmad Padli. The undertaking is clearly an unconditional undertaking.

[2] The court should not look outside the document or import extrinsic evidence to contradict the very clear and unambiguous terms of the undertaking. In construing the terms of the undertaking, the court, therefore, must ignore the evidence of the 'agreement' allegedly entered into by the plaintiff's credit officer.

[3] What the defendants have sought to do by Abdul Roni's affidavit is to introduce extrinsic evidence about the 'agreement' of the plaintiff's credit officer not to act on the undertaking so as to contradict the terms of a written document. Clearly, such evidence is inadmissible under ss. 91 and 92 of the Evidence Act 1950.

[4] It is highly improbable that the credit officer would agree not to enforce the undertaking bearing in mind that he had insisted on an unconditional undertaking. That would mean that the credit officer was agreeable to a practically unenforceable undertaking because, so long as Ahmad Padli had not received his commission for whatever reason, the undertaking could not be enforced, and if that be so it would be in Ahmad Padli's interest never to receive the commission. To believe that the credit officer would agree to such a condition is inherently incredible.

[5] The undertaking, being an undertaking for payment of a specified amount by an ascertained date, is clear and unconditional. This is therefore a proper case in which the court can exercise its summary jurisdiction and enforce the defendants' undertaking. In any case, the averment regarding the credit officer's 'agreement' is not sufficiently plausible to raise any dispute which needs to be resolved at a trial.

[Order in terms of application.]

Cases referred to:
Eng Mee Yong v. V Letchumanan [1979] 2 MLJ 212 ***(refd)***
Silver & Drake v. Baines [1971] 1 QB 396 ***(refd)***
United Malayan Banking Corporation Bhd v. Tan Lian Kong & Ors [1990] 1 MLJ 280 ***(foll)***

Legislation referred to:
Evidence Act 1950, ss. 91, 92

For the plaintiff - Pardeep Singh; M/s Choong Yik Son & Fiona Ghaus
For the defendants - Abdul Roni Abd Rahman; M/s Haranay, Roni & Anikah

Reported by WA Sharif

JUDGMENT

Clement Skinner JC:

This is an application by the plaintiff to enforce a solicitor's undertaking against the 2nd, 3rd and 4th defendants, as partners in the 1st defendant legal firm of Messrs Haranay, Roni & Anikah (the firm), to pay the plaintiff the sum of RM26,000 within twenty four hours of being so ordered.

The facts giving rise to this application are as follows.

On 26 August 1996, the plaintiff, a bank, obtained judgment against three persons in the magistrates' court, Ipoh, in the sum of RM24,352 together with interest thereon at 8.80% per annum from 8 May 1996 till date of judgment and thereafter at 8% per annum till date of payment. One of the persons against whom judgment was obtained is a person called Ahmad Padli bin Md. Yosp (hereinafter Ahmad Padli). In execution of its judgment, the plaintiff on 13 January 1997 obtained a

writ of seizure and sale which was on 31 January 1997 levied against the goods of Ahmad Padli and the goods thereby seized were ordered by the magistrates' court, Kuala Kangsar to be sold by public auction on 14 March 1997.

Following such seizure, Ahmad Padli made representation to the plaintiff and obtained a postponement of the sale to 31 March 1997 and subsequently to 5 May 1997. However on Ahmad Padli's failure to settle his outstanding, the plaintiff through their solicitors obtained an order from the majistrate's court, Kuala Kangsar, to hold an auction on 28 August 1997 which also did not take place as a result of intervention by the 1st defendant legal firm of Harany Roni & Anikah on behalf of Ahmad Padli.

On 5 September 1997 the legal firm as solicitors for Ahmad Padli wrote to the plaintiff, requesting the plaintiff not to proceed further with the auction and giving to the plaintiff an undertaking to pay the sum of RM26,000 within six months of the date of the letter. Since the terms in which this letter is written are relevant to this application, I set it out in full:

5th Sept. 1997

The Manager,
Bank Kerjasama Rakyat Malaysia Berhad,
No. 41, 43 & 45, Medan Gopeng 1,
Jalan Gopeng,
30750 Ipoh,
Perak.

Dear Sir,

Re: Ipoh Magistrates' Court Summons No. 72-1473-96
Bank Kerjasama Rakyat Malaysia Bhd. vs. Ahmad Padli bin Md. Yosp
Kuala Kangsar Magistrates' Court AE No. 76-1-97

We act for En Ahmad Padli bin Md. Yosp (Nric No. T 410853) of Kampong Suak Petai, 33800, Manong, Kuala Kangsar, Perak.

We have been informed by our clients that judgment was entered against him on the 26th August, 1996 for the sum of RM24,352.00 together with costs and interest accruing thereon until date of full satisfaction.

Further our client informs us that a writ of seizure and sale has been issued against him and the same was executed at premises known as Kampong Suak Petai, 33800 Manong, Kuala Kangsar.

We hereby give you our express and unqualified undertaking to pay you the sum of RM26,000.00 within six months from the date of this letter hereof in satisfaction of the judgment debt owing by our client.

In the premises, kindly do not proceed further with the auction of the movable properties seized

Yours faithfully,

The defendants have failed to honour their undertaking despite a demand from the plaintiff's solicitors dated 22 April 1998. Hence this application.

The defendants oppose it and in doing so have filed an affidavit in opposition affirmed on 10 January 1998 by Abdul Roni bin Abd. Rahman (hereinafter Abdul Roni's affidavit), the 3rd defendant and a partner of the firm. Paragraph 6 of Abdul Roni's affidavit explains the circumstances in which the undertaking was given. It is alleged therein that Ahmad Padli had on 17 July 1997 arranged to sell a piece of land through the firm. From this transaction, Ahmad Padli was expected to receive RM26,706.25 as commission. The 3rd defendant therefore personally spoke to the plaintiff's credit officer one Abdul Aziz explaining the above. It is alleged that the plaintiff's credit officer would only agree to postpone the auction scheduled for 28 August 1998 on condition the plaintiff received from the firm an unconditional undertaking despite the 3rd defendant making it clear that he was only willing to give an undertaking which was conditional on the commission being received by Ahmad Padli. Notwithstanding the 3rd defendant's abovestated stand, the credit officer insisted on receiving an unconditional undertaking but agreed that it would not be acted upon until Ahmad Padli had received his commission. In reliance on the assurance, the defendants allegedly issued their unconditional undertaking.

Based on what is stated above, learned counsel for the defendants in submissions raised two grounds to oppose the plaintiff's application:

(1) The undertaking although unconditional in terms, was in fact a conditional one, as it was given upon an agreement or assurance of the plaintiff's credit officer that it would not be enforced until Ahmad Padli received his commission;

(2) the above allegation which is made in para. 6 of Abdul Roni's affidavit has not been denied, refuted or replied to by the plaintiff by reason whereof the plaintiff must be taken as accepting the allegation and if so, there is clearly a dispute as to the enforceability of the undertaking.

In reply to the first ground, learned counsel for the plaintiff states that this court, in deciding whether or not the letter of undertaking is conditional or unconditional, should restrict itself to looking at the document itself and the words found therein. On doing this, it will be seen that no mention is made of any conversation between the credit officer and Abdul Roni nor to any commission payable to Ahmad Padli. The undertaking is clearly expressed in unconditional terms. In effect, what learned counsel for the plaintiff submits is that the court should not look outside the document or import extrinsic evidence to contradict the very clear and unambiguous terms of the undertaking. I find there is merit in this submission because what the defendants have sought to do by para. 6 of Abdul Roni's affidavit is to introduce extrinsic evidence about the 'agreement' of the plaintiff's credit officer not to act on the undertaking so as to contradict the terms of a written

document. The defendants' attempt is contrary to the provisions of ss. 91 and 92 of the Evidence Act 1950, which by s. 91 excludes extrinsic evidence from being adduced in proof of the terms of a document except the document itself and s. 92 of which prohibits the admission of extrinsic evidence by the parties thereto, to *inter alia,* contradict the terms of a document. In the case of *United Malayan Banking Corporation Bhd v. Tan Lian Kong & Ors.* [1990] 1 MLJ 280, Edgar Joseph Jr. J (as his lordship then was), in dealing with a case in which a party thereto tried to introduce extrinsic evidence to contradict the terms of a guarantee and indemnity, sounded a caution that where from time to time an attempt is made to adduce evidence of negotiation on the grounds that it is part of the 'matrix of fact', the temptation to do so ought to be resisted. I intend to do just that in this case by holding that in construing the terms of the undertaking I must ignore evidence of the alleged 'agreement' with the credit officer of the plaintiff as such evidence is to be excluded and remains inadmissible under the provision of s. 91 and s. 92 of the Evidence Act 1950. I accordingly hold that the undertaking is unconditional in terms.

With regard to the second ground raised by the defendants, in view of my above finding that extrinsic evidence regarding the 'agreement' of the credit officer is to be excluded and inadmissible, the averments in para. 6 of Abdul Roni's affidavit cannot be relied upon by the defendants as raising any dispute. However, if I am wrong in my earlier finding and the averments in para. 6 are not to be excluded but considered by this court, I do not think that every allegation or statement in an affidavit must be accepted by the court uncritically and without reservation as to the truth of such statement. The very statement relied upon may on closer scrutiny afford reasons for not accepting or giving any credence to it, so that a failure to respond or reply to it will not as a matter of course give rise to a dispute of fact. In the case of *Eng Mee Yong v. V. Letchumanan* [1979] 2 MLJ 212 at p. 217, Lord Diplock delivering the opinion of the Privy Council stated:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement in an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be ... It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to merit further investigation as to their truth.

Bearing in mind what is stated above, when what is stated in para. 6 of Abdul Roni's affidavit is considered fully, it shows that the 3rd defendant tried to give a conditional undertaking, the condition being the receipt by Ahmad Padli of his commission. However, the plaintiff's credit officer insisted on an unconditional undertaking. If that is so, it is highly improbable that the credit officer would then

agree not to enforce the undertaking until Ahmad Padli received his commission. To do so would in effect mean the credit officer was agreeable to a practically unenforceable undertaking because so long as Ahmad Padli had not received his commission for whatever reason, the undertaking could not be enforced. And, if that be the case, then it would be in Ahmad Padli's interest never to receive the commission. To believe that the credit officer would agree to such a condition is inherently improbable.

For the above reasons, I find that the averment regarding the credit officer's 'agreement' put forward in para. 6 of Abdul Roni's affidavit is not sufficiently plausible to raise any dispute which needs to be determined or resolved at a trial. In the result, I find that this is a proper case in which the court can exercise its summary jurisdiction to enforce the defendants' undertaking. The undertaking is clear and unconditional in terms. It is for the payment of a specified amount by an ascertained date.

In the case of *Tungku Ismail bin Tunku Mohd. Jewa & Anor v. Tetuan Hisham, Sabri & Kadir,* Wan Adnan J (as his lordship then was) in dealing with a case also involving the enforcement of a solicitor's undertaking, held that the summary jurisdiction to enforce a solicitor's undertaking should only be exercised in a clear case. In so holding his lordship referred to the case of *Silver & Drake v. Baines* [1971] 1 QB 396 where Lord Dening MR said:

> This court has from time immemorial exercised a summary jurisdiction over solicitors. They are officers of the court and are answerable to the court for anything that goes wrong in the execution of their office. Even if the solicitor has been guilty of no fault personally but it is the fault of his clerk, he is accountable for it. This jurisdiction extends so far that if a solicitor gives an undertaking in his capacity as a solicitor the court may order him straightaway to perform his undertaking to the court. Nor need it be given in connection with legal proceedings. It may be a simple undertaking to pay money, provided always it is given 'in his capacity as a solicitor'. If such an undertaking is given, the court may summarily make an order on the solicitor to fulfil his undertaking ... This summary jurisdiction means, however, that the solicitor is deprived of the advantages which ordinarily avail a defendant on a trial. There are no pleadings; no discovery; and no oral evidence, save by leave. The jurisdiction should, therefore, only be exercised in a clear case.

Having considered fully the facts and evidence before me, I am satisfied that this is a clear case for the court to order the enforcement of the defendants' undertaking given as solicitors to the plaintiff. I accordingly allow the plaintiff's application in the terms of the originating summons and costs.